

871—26.9(17A,96) Discovery.

26.9(1) Discovery procedures applicable to civil actions are available to all parties in interest in contested cases.

26.9(2) Unless otherwise limited by a protective order, discovery is not limited. Upon application by any adversely affected party or upon the presiding officer's own motion, the presiding officer may limit discovery in the following situations:

- a.* The discovery sought is unduly repetitious, or the information sought can be obtained by another method that is more convenient, less burdensome or less expensive; or
- b.* The party seeking discovery has had prior ample opportunity to obtain the information; or
- c.* The discovery is unduly burdensome or expensive when viewed in the context of the factual issues to be resolved, the limited resources of the parties, and the parties' interest in prompt resolution of the contested case.

26.9(3) A party may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the contested case, including the existence, description, nature, custody, condition and location of any tangible items and the identity and location of persons having knowledge of discoverable matters. Information may be discovered, even if inadmissible itself, if it appears reasonably calculated to lead to the discovery of admissible evidence. The names of a party's witnesses, their expected testimony, and exhibits to be offered into evidence may be obtained by discovery.

26.9(4) A party who responded to a request for discovery with a response which was complete and accurate when made need not supplement the response to include information obtained later. However, a party must promptly supplement its response to requests for the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called to testify at the hearing, and the party must produce copies of exhibits expected to be offered into evidence at the hearing as such decisions are made. A party must also promptly amend any response if it obtains information showing that its prior response was incorrect when made or, though correct when made, is no longer correct.

26.9(5) No motion relating to discovery, including motions for imposition of sanctions, will be considered unless the moving party states that it made a good-faith but unsuccessful effort to resolve the issues raised in the motion with the opposing party without intervention by the presiding officer.

26.9(6) Upon motion by a party or the person from whom discovery is sought or by any person who may be adversely affected thereby, and for good cause shown, the presiding officer before whom the contested case is pending may make any order which justice requires to protect a party or person from oppression or undue burden or expense. Such order may deny the request for discovery or limit terms, conditions, manner and scope thereof.

26.9(7) A party may, in accordance with subrule 26.9(5), ask the presiding officer for an order compelling discovery if the other party fails within a reasonable time to make a complete, good-faith response. After notice to both parties and hearing on the motion, the presiding officer shall enter an order which denies or compels discovery. This order may be combined with a protective order pursuant to subrule 26.9(6).

26.9(8) Upon written request by any party or upon the presiding officer's own motion, the presiding officer may impose sanctions for the failure to respond to discovery requests; however, sanctions shall not be imposed without prior specific notice from the presiding officer of the contemplated sanction, opportunity to be heard and, if necessary, further opportunity to cure its failure. The sanctions may include the following:

- a.* Postponing and rescheduling the hearing if requested by the party demonstrably prejudiced by the failure;
- b.* Excluding testimony of witnesses not identified in response to a specific request for such information;
- c.* Excluding from the record those exhibits not identified in response to a specific request for such information;
- d.* Excluding the party from participating in the contested case proceedings;
- e.* Dismissing the party's appeal.

26.9(9) Requests for discovery shall be served on the opposing party by ordinary mail, fax or e-mail. Responses must be served on the party requesting the discovery within ten days after the discovery request is sent unless the presiding officer grants an extension of time to comply. Requests for discovery must be made at least ten days before a scheduled contested case hearing. A party's inattention to preparation is not good cause to postpone the hearing.

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